Isidro Leonardo Quito Cruz v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–75 OF 2011(B)

ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, ABDUL HAMID EMBONG AND SULONG MATJERAIE FCJJ

9 JANUARY 2013

Criminal Procedure — Trafficking in dangerous drugs — Proof of case beyond reasonable doubt — Appeal — 141 pellets of 790.6g of cocaine discharged out of body — Presumption under s 37(da)(ix) of the Dangerous Drugs Act 1952 — Accused called to enter defence — Whether drugs were to be trafficked into Malaysia — Whether defence afterthought — Whether there was break in chain of prosecution's evidence — Whether there was doubt to identification of pellets — Whether failure of arresting officer to produce a search and seizure list fatal

When the appellant, a Peruvian, arrived at the Kuala Lumpur International Airport, he was subjected to a quick body search. However, nothing incriminating was found on him and the appellant was then brought to the KLIA Police Station where a police report was made. The appellant was later taken for an x-ray examination at a hospital and his bowel was detected to be filled with oblong-shaped foreign objects. He was also administered with medication to induce bowel movements and in the following five days, 141 pellets were discharged out of his body, suspected to be dangerous drugs. A chemical analysis later confirmed that the pellets were 790.6g of cocaine ('the said drugs'). The appellant was charged to be in possession of the said drugs and the trial judge invoked the presumption under s 37(da)(ix) of the Dangerous Drugs Act 1952 ('DDA') to call upon him to enter his defence. Although the appellant admitted that he had swallowed the said drugs, he denied that they were to be trafficked into Malaysia. At the end of the prosecution's case, the learned trial judge found that the appellant had failed to rebut the s 37(da) presumption and rejected his defence as an afterthought. The Court of Appeal affirmed the finding of guilt by the learned trial judge and opined that the said drugs were clearly not in transit. The appellant submitted that there had been a break in the chain of the prosecution's evidence. It was the appellant's defence that there had been a failure by the primary witnesses who recovered the pellets from the appellant, to properly identify and that the identification of these pellets was doubtful as the witnesses themselves had failed to lodge their own police reports on the recovery of those pellets. It was further submitted that these flaws resulted in a serious doubt as to the identity of the exhibits. The next

issue was on the failure of the arresting officer to produce a search and seizure list after the appellant was arrested at the KLIA arrival hall.

Held, dismissing the appeal; confirming the conviction and sentence:

(1) The issues raised before the present court primarily concerned the findings of fact by the learned trial judge, which findings had not been questioned by the appellant on appeal, and as such, must be taken as non-issues at the appellate stage. The prosecution had succeeded in proving a prima facie case against the appellant when he was found to be in actual possession of the drugs in question and had knowledge of them. There could not have been any question of doubtful identity of those drugs since the appellant himself had admitted to swallowing them. The flaws to the prosecution case must be taken as having been totally evaluated by the learned trial judge when he made a finding of a prima facie case against the appellant. In any event, those so-called flaws had in no way vitiated the prosecution case at that prima facie stage. The drugs were also specially packed in small plastic pellets and were discharged from the body of the appellant himself. There could not be any doubt on their identity (see para 11).

(2) The trial judge had come to his findings after assessing the demeanor of the appellant whom he found not to be illiterate or ignorant of the English language as to be utterly unaware of what he was then doing. The evidence of PW19, who stamped the appellant's document, was not challenged under cross-examination to create any doubt in the prosecution version that the appellant has voluntarily entered the country. These findings of fact and the credibility of the appellant were all matters within the volition and good judgment of a trial judge to which an appellate court, without that audio visual advantage during a trial, ought to give its utmost respect (see para 15).

(3) Part V of the DDA is specifically intended for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes as provided under the Single Convention of Narcotic Drugs 1961. Part V of the DDA had no application to this case. The appellant was charged with trafficking in dangerous drugs under s 39B of the DDA. An offence under s 39B of the DDA is proven when the court is satisfied beyond a reasonable doubt that the offender was in possession of dangerous drugs. With proof of care and custody being the prerequisites, and once this minimal element is proven and the operation of the presumption under s 37(da) is triggered, the offence of trafficking would be established (see paras 18–19).

(4) The distribution and consumption qualification was unsuitably applied in the context of an offence of trafficking under s 39B DDA. The key word 'traffic' did not involve the components of 'distribution or

consumption'. A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s 37(d) of the DDA is invoked and to have known the nature of such drug. Alternatively, once the prosecution has succeeded in proving by direct evidence and thus, on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s 37(da), he is in law presumed to be trafficking in that said drug, albeit without any intention for its distribution or consumption (see para 23).

(5) By the very definition of trafficking under s 2 of the DDA, the appellant had been proven as a fact, to have trafficked in the said drugs by way of importing them into Malaysia. That act alone implied that he had trafficked in the said drugs, regardless of whether he achieved the purpose of that act of importation (see para 25).

(6) The 'in transit' defence in the nature as was held in *Tellon*'s should no longer be accepted as a valid defence for a charge of trafficking in dangerous drugs under s 39B of the DDA. If this defence were accepted then incoming foreigners drugs traffickers who stood before or at the Immigration checkpoints at KLIA would be immuned from any criminal liability under s 39B of the DDA, a situation not envisaged surely, when Part V of the DDA was promulgated (see para 32).

[Bahasa Malaysia summary

Apabila perayu, seorang warganegara Peru, tiba di Lapangan Terbang Antarabangsa Kuala Lumpur, pemeriksaan badan telah dilakukan ke atasnya. Walau bagaimanapun, tiada apa-apa yang salah didapati padanya dan perayu kemudian telah dibawa ke Balai Polis KLIA di mana satu laporan polis telah dibuat. Perayu kemudian telah dibawa untuk pemeriksaan sinaran-x di sebuah hospital dan ususnya didapati penuh dengan objek asing berbentuk empat segi panjang. Dia juga telah diberikan ubat untuk menyebabkan pergerakan usus dan sepanjang lima hari berikut, 141 pelet dapat dikeluarkan daripada badannya yang disyaki dadah berbahaya. Analisis kimia kemudian mengesahkan bahawa pellet-pelet itu adalah dadah kokain seberat 790.6g ('dadah tersebut'). Perayu telah dituduh memiliki dadah tersebut dan hakim perbicaraan menggunakan andaian di bawah s 37(da)(ix) Akta Dadah Berbahaya 1952 ('ADB') untuk memanggilnya memasuki pembelaan. Walaupun perayu mengaku bahawa dia telah menelan dadah tersebut, dia menafikan bahawa ia adalah untuk pengedaran ke Malaysia. Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana mendapati bahawa perayu telah gagal mematahkan andaian s 37(da) dan menolak pembelaannya sebagai suatu yang telah difikirkan kemudian. Mahkamah Rayuan mengesahkan penemuan bersalah oleh hakim perbicaraan yang bijaksana dan berpendapat bahawa dadah tersebut jelas bukan dalam transit. Perayu berhujah bahawa terdapat rantaian keterangan pendakwaan yang terputus. Adalah pembelaan perayu bahawa terdapat kegagalan oleh saksi-saksi utama yang mendapat

pelet-pelet itu daripada perayu, untuk mengenal pasti dengan jelas dan bahawa pengecaman pelet-pelet tersebut adalah diragui kerana saksi-saksi itu sendiri telah gagal untuk membuat laporan polis sendiri setelah mendapat pelet-pelet tersebut. Selanjutnya dihujahkan bahawa kecacatan-kecacatan tersebut mengakibatkan keraguan serius berhubung identiti ekshibit-ekshibit itu. Isu seterusnya adalah berhubung kegagalan pegawai tangkapan mengemukakan senarai carian dan rampasan setelah perayu ditangkap di dewan ketibaan KLIA.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

(1) Isu-isu yang ditimbulkan di hadapan mahkamah ini khususnya berkenaan penemuan fakta oleh hakim perbicaraan yang bijaksana, yang mana penemuan tersebut tidak dipersoalkan oleh perayu dalam rayuan, dan oleh itu, ia hendaklah dianggap sebagai buka suatu isu di peringkat rayuan. Pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu apabila dia mendapati dalam milikan sebenar dadah tersebut yang dipersoalkan dan mempunyai pengetahuan mengenainya. Tiada apa-apa yang boleh dipersoalkan berhubung identiti dadah tersebut yang diragui oleh sebab perayu sendiri telah mengakui menelannya. Kecacatan pada kes pendakwaan hendaklah diteliti secara keseluruhan oleh hakim perbicaraan yang bijaksana apabila beliau membuat penemuan kes prima facie terhadap perayu. Dalam apa keadaan, kecacatan tersebut dengan sendiri tidak menjadikan kes pendakwaan tidak sah di peringkat prima facie. Dadah tersebut juga dibungkus khas dalam pelet-pelet plastik kecil dan dikeluarkan daripada badan perayu sendiri. Tiada apa-apa keraguan berhubung identiti dadah tersebut (lihat perenggan 11).

(2) Hakim perbicaraan tiba kepada penemuannya setelah menilai perilaku perayu yang didapatinya bukan buta huruf atau tidak mengetahui bahasa Inggeris sehingga tidak sedar langsung apa yang dilakukannya pada masa itu. Keterangan PW19, yang mengecap dokumen perayu tidak dicabar di bawah pemeriksaan balas untuk mewujudkan apa-apa keraguan dalam versi pendakwaan bahawa perayu telah memasuki negara ini sebcara sukarela. Penemuan fakta tersebut dan kebolehpercayaan perayu adalah perkara-perkara dalam kerelaan dan penghakiman wajar hakim perbicaraan yang mana mahkamah rayuan, tanpa kelebihan audiovisual semasa perbicaraan, patut hormati (lihat perenggan 15).

(3) Bahagian V ADB secara khusus mempunyai niat bagi tujuan mengawal pengimportan dan pengeksportan dadah berbahaya untuk tujuan sah sebagaimana diperuntukkan di bawah Single Convention of Narcotic Drugs 1961. Bahagian V ADB tidak terpakai dalam kes ini. Perayu telah dituduh mengedar dadah berbahaya di bawah s 39B ADB. Kesalahan di bawah s 39B ADB telah dibuktikan apabila mahkamah berpuas hati

melampaui keraguan munasabah bahawa pesalah mempunyai milikan dadah berbahaya. Dengan bukti jagaan dan kawalan sebagai prasyarat, dan setelah elemen minimum ini dibuktikan dan pelaksanaan andaian di bawah s 37(da) tercetus, kesalahan pengedaran dapat dibuktikan (lihat perenggan 18–19).

(4) Kelayakan pengedaran dan penggunaan tidak sesuai terpakai dalam konteks kesalahan pengedaran di bawah s 39B ADB. Kata kunci 'pengedaran' tidak melibatkan 'pengedaran atau penggunaan' komponen. Seseorang yang didapati mempunyai kawalan dan jagaan dadah berbahaya itu adalah dianggap mempunyai milikan jika andaian di bawah s 37(d) ADB digunakan dan mempunyai pengetahuan berhubung jenis dadah tersebut. Secara alternatif, setelah pendakwaan telah berjaya membuktikan secara keterangan langsung dan oleh itu, berdasarkan penemuan fakta, bahawa seseorang itu mempunyai milikan sejumlah tertentu dadah berbahaya sebagaimana disenaraikan di bawah s 37(da), dari segi undang-undang dia dianggap mengedar dadah tersebut, meskipun tanpa apa-apa niat untuk mengedar atau menggunanya (lihat perenggan 23).

(5) Menurut definisi pengedaran di bawah s 2 ADB, perayu telah membuktikan pada hakikatnya, telah mengedar dadah tersebut dengan mengimportnya ke Malaysia. Tindakan itu sendiri menandakan bahawa dia telah mengedar dadah tersebut, tidak kira sama ada dia mencapai tujuan perbuatan pengimportan itu (lihat perenggan 25).

(6) Pembelaan 'dalam transit' sebagaimana diputuskan dalam *Tellon*'s tidak patut lagi diterima sebagai pembelaan sah untuk pertuduhan pengedaran dadah berbahaya di bawah s 39B ADB. Jika pembelaan ini diterima maka pengedar-pengedar dadah negara asing yang datang ke Malaysia yang tiba di pusat pemeriksaan imigeren di KLIA akan lali daripada liabiliti jenayah di bawah s 39B ADB, satu keadaan yang tidak dijangkakan, apabila Bahagian V, ADB digubal (lihat perenggan 32).]

Notes

For a case on proof of case beyond reasonable doubt, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5079.

Cases referred to

Antonio Dias Caldeira v Frederick Augustus Gray [1936] MLJ 110; [1934] 1 LNS 5, PC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)

Koh Tiong Hock v PP [2011] 4 MLJ 40; [2011] 2 CLJ 377, CA (refd)

Lee Chee Meng v PP [1992] 1 MLJ 322, SC (refd)

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (refd)

Low Kian Boon & Anor v PP [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd) A
Ng Kwok Chun & Anor v PP (1993) 1 SLR 55, CA (refd)
Ong Lock Soon v PP [2012] 2 MLJ 641; [2006] 8 CLJ 482, CA (refd)
PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183; [1998] 4 CLJ 278, CA (not folld)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd) B

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 21(6), 37(d), (da), (da)(ix), 39B, Part V

C

Edmund Bon Tai Soon (Chan Yen Hui with him) (Chooi & Company) for the appellant.
Mohamad Abazafree bin Mohd Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

D

Abdull Hamid Embong FCJ (delivering judgment of the court):

[1] The appellant, a Peruvian, arrived at the Kuala Lumpur International Airport on 10 October 2006, en route from Buenos Aires to Phuket. Upon arrival at KLIA, the appellant went to Gate H to take a Malaysia Airline flight to Phuket, scheduled at 6.10pm. He then passed through the immigration checkpoint counter. An immigration officer on duty ('PW19') stamped his passport, granting him a social pass which allowed the appellant to stay in Malaysia for 90 days. PW19 also stamped the immigration Form 26 and handed it over to the appellant. When he emerged from the immigration counter, Inspector Basri Husain ('PW4'), who was on surveillance duty at the KLIA, approached the appellant and introduced himself as a police officer. A quick body search on the appellant showed he was not carrying any contraband. The appellant was then brought to the KLIA Police Station where a police report was made.

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[2] The appellant was later brought to the Serdang Hospital where an x-ray examination was done on his abdomen. His bowel was detected to be filled with foreign bodies, oblong in shape.

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[3] The appellant was then warded in Ward 6C of the hospital. Medication was given to him to induce bowel movements. This resulted in the appellant, in the following five days, discharging out a total of 141 pellets suspected to be dangerous drugs. Upon analysis by the chemistry department, the pellets were found to contain 790.6g of cocaine, ('the said drugs') now the subject of the charge against him.

I

[4] The trial judge found the appellant to be in possession of the said drugs

and invoked the presumption under s 37(da)(ix) of the Dangerous Drugs Act 1952 ('DDA') to call upon him to enter his defence.

THE DEFENCE

[5] The appellant said that upon arrival at KLIA he went to the transit section, where upon presenting his airline ticket he was given a boarding pass to Phuket, to depart from Gate H. He then went to the information counter to change his flight to an earlier one but found it unmanned. He then went to the immigration counter to make enquires about a change in his flight schedule. He spoke in Spanish but was not understood. Then he saw two persons beyond the immigration counter, one of whom waved at him. These two persons were policemen. At the immigration counter, his passport was seized by a policeman and given to the immigration officer. He said that he passed through the immigration checkpoint because he thought that the person who waved at him was there to help him.

[6] The appellant admitted that he had swallowed the said drugs, found in his bowel, but denied that they were to be trafficked into Malaysia.

[7] The learned trial judge found that the appellant had failed to rebut the s 37(da) presumption, rejected his defence as an afterthought and found that he had failed to raise a reasonable doubt on the prosecution's case.

[8] The Court of Appeal affirmed the finding of guilt by the learned trial judge and opined that the said drugs were clearly not in transit as expounded in the case of *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183; [1998] 4 CLJ 278 and that Part V of the DDA is intended only for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes. As such the carrying of the said drugs in this case is not covered by the 'in transit provisions under Part V' of the DDA, including s 21(6).

[9] Before us, learned counsel for the appellant submitted that there had been a break in the chain of the prosecution's evidence. The thrust of the submission on this gap issue, according to learned counsel goes to the identity of the said drugs itself. Learned counsel contended that there had been a failure by the primary witnesses who recovered the pellets from the appellant, to properly identify the 11 pellets discharged by the appellant on 11 October 2006, the 17 pellets discharged on 12 October 2006, the 21 pellets discharged by the appellant on 13 Octoberv 2006, the 11 pellets on 14 October 2006, and the four pellets discharged on 15 October 2006. All these pellets were handed over to PW17 who marked the pellets and lodged separate police reports upon their recovery. It was submitted that the identification of these pellets were

doubtful since PW7, PW11, PW12, PW13, PW15 and PW16 who respectively recovered the pellets from the appellants had not marked the plastic bags into which those pellets were put to be handed over to PW17. Further, these witnesses themselves had failed to lodge their own police reports on the recovery of those pellets. These flaws, it was submitted resulted in a serious doubt as to the identity of the exhibits, thus nullifying any prima facie case. *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322 was cited as authority in support of this proposition.

[10] The next issue was on the failure of the arresting officer ('PW4') to produce a search and seizure list after the appellant was arrested at the KLIA arrival hall. A total of 12 personal items belonging to the appellant were seized by PW4 who handed them over to PW17. But no search list on those items were tendered. The evidence shows that PW17 was together with PW4 when a body search was conducted on the appellant. In his testimony PW17 identified only 11 of the 12 items recovered by PW4 from the search. One item ie the boarding pass issued by MAS from Argentina (exh P34) was not identified by PW17 when he gave evidence. Also not identified was a piece of paper bearing the name of a hotel in Phuket which was recovered from the appellant's wallet (exh P31).

[11] The above issues concern primarily the findings of fact by the learned trial judge, which findings had not been questioned by the appellant on appeal, and as such, must be taken as non-issues at the appellate stage. We have considered the findings of the learned trial judge who stated that he had fully evaluated the evidence as adduced by the prosecution on a maximum scale and found that the prosecution had succeeded in proving a prima facie case against the appellant when he was found to be in actual possession of the drugs in question and had knowledge of them. We found that there could not have been any question of doubtful identity of those drugs since the appellant himself had admitted to swallowing them. The flaws to the prosecution case, as submitted by learned counsel must be taken as having been totally evaluated by the learned trial judge when he made a finding of a prima facie case against the appellant. In any event, we are of the view that those so-called flaws had in no way vitiated the prosecution case at that prima facie stage. The drugs were also specially packed in small plastic pellets and were discharged from the body of the appellant himself. There could not be in our opinion any doubt on their identity.

THE 'IN TRANSIT' DEFENCE

[12] The principal defence emphatically argued before us, and in the courts below, was that the appellant was in transit at the KLIA. He had not intended to enter the country and as such could not have committed an offence for

which he was charged viz trafficking under s 39B of the DDA. Instead, and at best, he could only be guilty of an offence under s 21(6) of the DDA. It was submitted that the appellant did not want to enter Malaysia and was called to pass through the immigration checkpoint by the police. It was also submitted that there was no evidence that he intended to distribute the drugs within Malaysia. It was not meant for consumption within Malaysia and that it was purely meant to be transported to Phuket. The Court of Appeal's decision in *Tellon*'s case was heavily relied upon in support for an alternative conviction under s 21(6) of the DDA instead.

[13] It was the finding of facts of the courts below that the appellant was arrested when he emerged out of the immigration checkpoint counter. It was also a finding of fact that the appellant was granted a social visit permit to stay in Malaysia for 90 days and that all the relevant documents for his entry had been duly inspected and stamped by the immigration authority prior to his entry into Malaysia. The appellant himself did not deny walking pass the immigration checkpoint. The only dispute was that he had no intention to do so but had merely walked over to the policeman ('PW4') under the belief that PW4 could assist him with his enquiries.

[14] We reproduce below this relevant passage from the findings of the Court of Appeal:

> Having considered Isidro's evidence and upon testing it with PW4's, PW17's and PW19's evidence, the learned trial judge concluded Isidro's defence to be an afterthought, and that Isidro's evidence failed to raise any reasonable doubt in the prosecution's case. The learned trial judge accepted PW19 as a witness of truth whose evidence proved the sequence of events leading to his stamping of P23 and P27 with the immigration social visit pass stamp and then returning the same to Isidro. This is what the learned judge said in his judgment:
>
> > The evidence of the immigration officer SP19 that it was the accused who handed the passport P23, the disembarkation card P27 and he stamped the visit pass for 90 days on the accused passport was never challenged by the defence during the prosecution stage nor did the defence suggest to SP19 that it was the police who handed the passport to him. More importantly the defence never at any time suggested to the prosecution's witnesses SP4 and SP17 that it was the police and not the accused that handed over the passport to the immigration officer. The evidence aforesaid to my mind negated the defence counsel's contention that he was not on Malaysian soil. On this score I find that SP19 is a witness of truth who testified as to the sequence of events leading to his impressing the immigration visit pass stamp on the accused's passport. His evidence is not only consistent but credible. SP19 to my mind has no interest or motive to frame up the accused. The accused testimony that he did not realise that by crossing through the immigration counter he is on Malaysian soil to my mind is a mere denial and in any event ignorance of the law does not and cannot rebut the statutory presumption arising under s 37(da) of the Act.

We agree with his conclusion. In considering P27 we have not lost sight of learned counsel's contention that the arrival portion (which was not produced) if produced would show that Isidro's version of the events on the day in question might have been true. We are unable to accept that contention. There is no evidence to show that that document was withheld or suppressed by the prosecution. In his evidence, PW19 explained that there were two portions to the immigration 26 Form ('P27') — the arrival and the departure portions. PW19 said the arrival portion was kept by the immigration, and the departure portion was put in the passport to be submitted to the immigration when the passport holder was to depart from Malaysia. Elaborating on the arrival portion, under cross-examination PW19 said he did not have it with him as it had been sent to and kept at the Immigration Headquarters, Putrajaya. The investigation officer ('PW25') wrote to the director general of the immigration on 7 July 2009 ('P72') to obtain the arrival portion, but was informed that it could not be found. PW25 was informed that the arrival portion would be disposed of three months after the date of arrival. That evidence by PW25 was not challenged by the defence. In the light of PW19's, PW4's and PW17's evidence as well as Isidro's own admission that he filled in P27 in his own handwriting, we could not see how the arrival portion would show that Isidro's version might have been true or raise reasonable doubt in the prosecution's case, (per Ahmad Hj Maarop, then JCA).

[15] Again we say that these are findings of facts which are not erroneous. The trial judge had come to his findings after assessing the demeanour of the appellant whom he found not to be illiterate or ignorant of the English language as to be utterly unaware of what he was then doing. Also the evidence of PW19, who stamped the appellant's document was not challenged under cross-examination to create any doubt in the prosecution version that the appellant has voluntarily entered the country. These findings of fact and the credibility of the appellant are all matters within the volition and good judgment of a trial judge to which an appellate court, without that audio-visual advantage during a trial, ought to give its utmost respect, (see *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; [1983] 2 CLJ 10).

[16] The Federal Court too does not make its own findings of fact, (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457). The function of this court, at this final stage of appeal in dealing with the findings of fact by the courts below is now limited in its scope, confined to the advice of the Privy Council in this passage from *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] MLJ 110 at 138; [1934] 1 LNS 5 which says:

> … that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trust worthiness of witnesses whom he has seen, an appellate court

must in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong.

Now, it settled law that it is no part of the function of an appellate court in a criminal case or indeed any case to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts.

There is also the now trite principle that this court will not interfere with any concurrent findings of fact by both the trial court and the intermediate appellate court. Unless there is a plain and overriding error which affected their assessment of facts, (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517. Also, *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489).

[17] In *Tellon*'s, the appellant who was initially charged with two offences under s 39B of the DDA was convicted on a court-amended charge under s 21(6) of the DDA for bringing into Malaysia dangerous drugs 'in transit otherwise than in accordance with the provisions of this section'. The Court of Appeal in that case opined that when 'a dangerous drug is in transit, the amount is irrelevant because it is completely a different kind of act and therefore a different kind of offence'.

[18] Learned counsel for the appellant submitted that since the facts in this case are similar to that of *Tellon*'s case, the appellant should, at the most, be convicted for an offence under s 21(6) of the DDA. It was also submitted that the Court of Appeal had been wrong to follow the decision of *Ong Lock Soon v Public Prosecutor* [2012] 2 MLJ 641; [2006] 8 CLJ 482 in deciding that s 21(6) of the DDA is intended only for the purpose of governing the importation of dangerous drugs for legitimate purposes (namely medical and scientific purposes as provided under the Single Convention on Narcotic Drugs 1961.)

[19] We agree with the Court of Appeal in the instant appeal which adopted the reasoning of the decision in *Ong Lock Soon*'s that Part V of the DDA is specifically intended for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes as provided under the Single Convention of Narcotic Drugs 1961. Reference to the *Hansard* was made by the court in *Ong Lock Soon*'s in analysing the intent of Part V, particularly to the speech of the Minister of Health who presented the Bill in Parliament. The Single Convention 1961 is an international convention whose aim, inter alia, is to 'restrict the use of narcotic drugs to medical and scientific

purposes and to prevent their diversion and abuse, while at the same time ensuring their availability for legitimate purposes'. Part V of the DDA was thus introduced to regulate and control the entry and exit of such dangerous drugs for legitimate purposes.

[20] In *Ong Lock Soon*'s, the Court of Appeal made the following observation in respect of the 'in transit' defence raised by the appellant in that case, and we quote:

> In other words regarding the specific defence ventilated before us, we are of the view that the provisions relating to dangerous drugs in transit under Part V of the DDA are intended to apply to dangerous drugs in transit for legitimate purposes. Even if Ong's evidence is accepted, the bringing of the proscribed drugs into Malaysia for the purpose of being carried to Australia by Ong for the use of Huan Choo's relative was not covered by the transit provisions under Part V of the DDA including s 21(6). The acceptance of learned counsel's contention would result in Malaysia being a very attractive and potentially safe transit haven for drug traffickers from all over the world. Such a consequence is to our mind absurd, contrary to international comity and certainly never intended by the Legislature.

[21] In our view, Part V of the DDA has no application to this case. The appellant is charged with trafficking in dangerous drugs under s 39B. It is to that section that this case must be looked at.

[22] Section 39B of the DDA was inserted vide Act A293, an amendment made on 30 April 1975. The definition of trafficking was inserted vide Act A390 which took effect on 18 March 1977.

[23] In *Tellon*'s, the Court of Appeal, in confirming a conviction under s 21(6) of the DDA gave the following reasons:

> As we have earlier observed that the meaning of being 'in transit' is for the 'sole purpose' of being carried to another country and therefore Malaysia will not be a country where the drug will be *distributed and consumed* and as such the presumption of trafficking cannot arise. (Emphasis added.)

With utmost respect, we are of the view that the distribution and consumption qualification was unsuitably applied in the context of an offence of trafficking under s 39B of the DDA. The key-word 'traffic' there does not involve the components of 'distribution or consumption'. A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s 37(d) is invoked and to have known the nature of such drug (s 37(d) of the DDA). Alternatively, once the prosecution has succeeded in proving by direct evidence and thus, on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s 37(da), he

is in law presumed to be trafficking in that said drug, albeit without any intention for its distribution or consumption.

[24] In this case, there was indisputable and direct evidence that the appellant was in possession of the said drugs in question. He even admitted to swallowing them. The learned trial judge made a positive finding that he was in possession of the drugs. We think that the learned judge had no other option in the face of this damaging evidence. At the end of the trial, it was the learned trial judge's finding that the appellant had failed to rebut the statutory presumption under s 37(da)(ix) now triggered against him, on a balance of probability.

[25] Also, by the very definition of trafficking under s 2 of the DDA, the appellant had been proven as a fact, to have trafficked in the said drugs by way of importing them into Malaysia. That act alone implies that he had trafficked in the said drugs, regardless of whether he achieved the purpose of that act of importation. Section 2 defines trafficking as follows:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act of the regulations made under the Act.

[26] We are in agreement with the reasoning of the Court of Appeal in the case of *Koh Tiong Hock v Public Prosecutor* [2011] 4 MLJ 40; [2011] 2 CLJ 377 when considering the effect of the word 'exporting' under s 2 of the DDA. The rationale can be similarly applied to the act of importing. The Court of Appeal said:

> Be that as it may, whether the proscribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s 2 clearly puts distribution abroad within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad. As submitted by the learned deputy the intention of the DDA is to encompass both drugs brought into and out of the country. The reference to the purpose for which the drug is being transported was made by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. As stated in the Singapore case of *Lau Chi Sing v Public Prosecutor* [1988] 1 MLJ 383; [1988] 1 LNS 187, the offence is completed once there is the act of transportation so long as its purpose is to transfer possession for some other person

in contradistinction to an intention to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[27] In this case, it was not the defence of the appellant that the drugs he trafficked in was for his own consumption. Furthermore the large amount involved (790.6g) raises a strong inference that it was not for his personal consumption (*Ong Ah Chuan*'s case).

[28] An offence under s 39B of the DDA is proven when the court is satisfied beyond a reasonable doubt that the offender was in possession of dangerous drugs. With proof of care and custody being the prerequisites, and once this minimal element is proven and the operation of the presumption under s 37(da) is triggered, the offence of trafficking would be established.

[29] Trafficking of drugs may occur anywhere on Malaysian soil, where its criminal jurisdiction extends. It may be committed at an airport, either before or after an immigration checkpoint or on a ship or on board of an aircraft lying within her territory. Malaysia can claim criminal jurisdiction on any offender who commits that offence in any of the said places, it being a crime within her territory.

[30] The appellant in this case was clearly on Malaysian soil. Even if he had not alighted from the aircraft, now parked at KLIA, he would still be in Malaysia and subject to her criminal laws.

[31] To accept the defence that the appellant can only be guilty of an offence under s 21(6) of the DDA since he was only 'in transit' at KLIA would be a ridiculous proposition. It would mean that a foreigner drug trafficker who stood beyond an immigration checkpoint at an airport, prior to official entry being granted to him, is immuned from the offence under s 39B of the DDA. But the same crime is committed by a Malaysian found in that same location. Surely, the law is not meant to categorise the offence according to the nationalities of the offenders! The 'in transit' plea in this case is to us irrelevant and a mere red herring to answer a charge under s 39B of the DDA. This offence, we reiterate is complete once the appellant is on Malaysian soil. The appellant here knew he had to enter Malaysia to take a connecting flight to Phuket. This situation arose in the Singapore case of *Ng Kwok Chun & Anor v Public Prosecutor* [1993] 1 SLR 55 where the Court of Appeal opined as follows:

The statement of the second appellant was also quite clear. He said that: 'I merely pass by Singapore and intend to take a flight to Brussels'. This shows that he was aware that his flight from Phuket would take him to Singapore and from Singapore

he would be taking a connecting flight to Brussels, which was his ultimate destination. He knew he was coming to Singapore although he intended to be here only on transit. There was, therefore, the requisite mens rea. He said that he did not know that by coming into Singapore in this manner he would be entering Singapore. That is really immaterial.

Accordingly, for the reasons given above, we dismissed the appeals and confirmed the sentences imposed by High Court.

[32] We hold that the 'in transit' defence in the nature as was held in *Tellon*'s should no longer be accepted as a valid defence for a charge of trafficking in dangerous drugs under s 39B of the DDA. If this defence were accepted then incoming foreigners drugs traffickers who stood before or at the immigration checkpoints at KLIA would be immuned from any criminal liability under s 39B of the DDA, a situation not envisaged surely, when Part V of the DDA was promulgated.

[33] For these reasons, the appeal is dismissed and the conviction and sentence on the appellant are hereby confirmed.

Appeal dismissed; conviction and sentence confirmed.

Reported by Afiq Mohamad Noor